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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN OMOJEWE AKAIGBE,

Defendant and Appellant.

D074295

(Super. Ct. No. SCD273863)

APPEAL from an order of the Superior Court of San Diego County, Jeffrey B. Barton, Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

This appeal is from a postsentencing victim restitution order in which the court ordered restitution to the victim for medical expenses and for lost cash. Defendant

contends there is not sufficient evidence to support the order for \$2,300 in lost cash. This appeal does not challenge the portion of the order requiring payment of the victim's medical expenses.

FACTS AND PROCEDURAL BACKGROUND

Defendant entered in a plea agreement, pursuant to which he pleaded guilty to burglary (Pen. Code, § 459)¹ and admitted one strike prior conviction (§ 667, subds. (b)-(i)). The parties stipulated to a four-year prison sentence. The remaining charges and allegations were dismissed. Defendant was sentenced in accordance with the plea agreement.

A restitution hearing was held after sentencing to address two claims of loss by the victim. After the hearing, the court ordered defendant to pay restitution in the amount of \$4,841.40, which included \$2,300 in cash which the victim said was taken in the burglary.

On September 8, 2017, the victim and her husband discovered defendant asleep in their previously locked car. The victim confronted defendant who was inside the car and holding the victim's purse. The victim tried to block defendant from leaving, but defendant pushed the victim's neck and shoved her out of the way. Defendant threatened to harm the victim.

The victim's purse contained \$2,300 in cash along with various items of identification. Defendant then fled from the location.

¹ All further statutory references are to the Penal Code unless otherwise specified.

A short while later defendant flagged down a police officer and reported he had been raped. During the investigation which followed, the officer realized defendant fit the description of the reported perpetrator of the crimes involving the victim. Ultimately, the victim identified defendant as the perpetrator. Police did not recover the victim's purse or any of the property the victim had reported as stolen.

The victim testified about her losses at the restitution hearing.

The trial court ordered the full amount of claimed restitution, including the lost cash in the amount of \$2,300.

DISCUSSION

Defendant's challenge to the cash portion of the restitution calculation is essentially a claim that the victim's testimony was not credible. Since the victim's money and purse were never found, and defendant was in contact with police shortly after the offense in this case, the victim's claim of \$2,300 in lost cash does not amount to substantial evidence. The trial court heard the victim's testimony as well as that of the arresting officer. The court found the victim to be credible, believed defendant had taken the purse with the cash in it. Applying the proper standard of review, we will affirm the trial court's order.

A. Legal Principles

Both the state constitution and statutes provide for restitution to victims of crime for losses incurred as a result of a defendant's conduct. (Cal. Const., art I, § 28; § 1202.4.) The defendant has a right to a hearing on the amount of such restitution. At that hearing the person seeking restitution has the burden of showing the justification for

restitution. Once a proper showing has been made the burden shifts to the defendant to refute the claim for restitution. (*People v. Giordano* (2007) 42 Cal.4th 644, 664 (*Giordano*); *People v. Fulton* (2003) 109 Cal.App.4th 876, 886-887.) The burden of proof at a restitution hearing is preponderance of the evidence. (*People v. Holmberg* (2011) 195 Cal.App.4th 1310, 1319-1320.)

When we review a trial court's decision on victim restitution we apply a mixed standard of review. As to the decision to award restitution and the setting of the amount we apply the abuse of discretion standard. (*Giordano, supra*, 42 Cal.4th at p. 663.) Where the court has applied a rational method of calculating restitution and where there is a factual basis for the amount ordered there is no abuse of discretion in the court's choice. (*People v. Baker* (2005) 126 Cal.App.4th 463, 467 (*Baker*).)

When there is a challenge to the factual basis of the calculation, we apply the substantial evidence standard of review. (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.) We do not reweigh the evidence, nor do we make credibility determinations. Our task is to determine if there is sufficient substantial evidence, if believed by the trial court, to support the court's decision. (*Baker, supra*, 126 Cal.App.4th at pp. 468-469.)

B. Analysis

As we have noted, defendant's challenge here is based in his claim the victim's testimony should not be believed. He argues it strains credulity to believe defendant took the purse and money but was found a short distance away and a short time after this offense without the property. Certainly, a trier of fact might have doubts where the property at issue was not recovered. On the other hand, a trier of fact, who observed the

victim and heard her testimony could also find she was telling the truth. The victim's version of events is not inherently incredible nor physically impossible, and, most importantly an experienced trial judge found the victim credible and believed her testimony.

It is not our role to make credibility judgments or to substitute our judgment for that of the trial court. Plainly there is substantial evidence to support the trial court's decision as to both the fact and the amount of the loss.

DISPOSITION

The order setting victim restitution in the amount of \$4,181.40 is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

DATO, J.